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In the Supreme Court of the United States

OCTOBER TERM, 1979

MARK RICHARD POWERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court's denial of petitioner's pretrial motion to close his entire trial to the public will deprive him of the right to a fair trial.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-36) is not yet reported. The opinion and order of the district court (Pet. App. 40-45) are reported at 477 F. Supp. 497.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1980. The petition for a writ of certiorari was filed on May 28, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was indicted in January 1979 in the United States District Court for the Southern District of Iowa, for conspiracy to counterfeit and possession of counterfeit plates, in violation of 18 U.S.C. 371 and 474. Petitioner pled not guilty. He then obtained, through discovery, certain records concerning his past activities as an informant for the FBI and the Iowa Department of Criminal Investigation (Pet. App. 1-2).

On July 25, 1979, petitioner moved to exclude the public from each and every part of his trial. In support of his motion, petitioner stated that he would offer as trial evidence much of the information that he had obtained through discovery, to establish his defense that he was acting as an undercover agent during the relevant period and therefore lacked the requisite criminal intent. Petitioner asserted that a public trial would interfere with the presentation of that defense because he feared for his safety and that of his family if his evidence became public. The government opposed petitioner's motion (Pet. App. 2).

On August 29 and September 4, 1979, the district court heard evidence on the motion, at which time petitioner testified *in camera*. On September 7, 1979, the district

court denied the motion by written order (Pet. App. 40-45). The court concluded that it had the power to close an entire criminal trial in exceptional circumstances, but it held that such action would be inappropriate unless the defendant established the existence of such circumstances by showing (Pet. App. 42):

> (1) by clear and convincing evidence that there was a clear and present danger of actual harm to the life of the defendant or a member of his family;
>
> (2) consent to the closure on the part of the prosecution, * * * or a compelling reason for not requiring the prosecution's consent;
>
> (3) by clear and convincing evidence that the closure of defendant's criminal trial would effectively prevent the harm alleged and proven to exist; and
>
> (4) by clear and convincing evidence that there are no effective alternatives to the complete closure of the criminal trial.

Based on the testimony presented, the court concluded that petitioner had not established a compelling need for closing the trial. The court stated (Pet. App. 42-43):

> The Court concludes that [petitioner] failed to prove by clear and convincing evidence that the open court presentation of his defense would result in a clear and present danger of actual harm to the life of the [petitioner] or a member of his family. The evidence at most demonstrates a fear of harm based on the allegedly violent nature of some of the persons involved. Admittedly, the [petitioner] has shown that the prosecution would never consent to the closure because the issue before the Court focuses on a possible defense to the prosecution's charges against the [petitioner]. [Petitioner], however, failed to prove

> that closure would effectively prevent the alleged harm, and provided the Court with no insight on how to prevent the jurors and witnesses from discussing the case subsequent to the trial, or on how to prevent the disclosure of information if the trial court's decision is appealed. In addition, it was brought to the attention of the Court in the closed portion of the hearing that the [petitioner] may generally be known to have been an informant for the Federal Bureau of Investigation and the Iowa Department of Criminal Investigation.

The court further noted that the use of a stipulation summarizing petitioner's *in camera* testimony might be an effective alternative to closure (Pet. App. 43-44).

Petitioner immediately appealed the district court's order under 28 U.S.C. 1291. The court of appeals affirmed, with one judge dissenting (Pet. App. 1-36).

ARGUMENT

Petitioner contends that the district court's failure to exclude the public from his trial will interfere with his defense and thereby deny him a fair trial. Petitioner concedes, as he must, that he has no absolute right to a private trial. *Gannett Co.* v. *DePasquale,* 443 U.S. 368, 383 (1979); *Singer* v. *United States,* 380 U.S. 24, 35 (1965). Indeed, this Court has recently held that the public and the press have a qualified constitutional right to attend criminal trials, requiring that "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public." *Richmond Newspapers, Inc.* v. *Virginia,* No. 79-243 (July 2, 1980), slip op. 24 (opinion of the Chief Justice) (footnote omitted). Because the *Richmond Newspapers* trial judge had determined to close that trial without making any findings in support of that action, this Court had no

occasion to consider any specific circumstances that might outweigh the public's right to attend. *Id.* at 23-24. The narrow question presented here is whether the district judge abused his discretion in holding that petitioner had not established the existence of circumstances that would justify the total exclusion of the public from all parts of his criminal trial.

1. At the outset, we question the court of appeals' exercise of appellate jurisdiction (Pet. App. 2-3 n.2) in these circumstances. While the court expressed "grave doubts" concerning the appealability of this interlocutory order, it assumed jurisdiction "to discuss the issue of closure in criminal trials" (*ibid.*).

28 U.S.C. 1291 grants jurisdiction to the courts of appeals to review only "final decisions." This Court has repeatedly emphasized the special importance of this rule of finality in the criminal context, where "the delays and disruptions" of interlocutory appeals "are especially inimical to the effective and fair administration of the criminal law." *DiBella* v. *United States*, 369 U.S. 121, 126 (1962); see also *United States* v. *MacDonald*, 435 U.S. 850, 853-854 (1978); *Abney* v. *United States*, 431 U.S. 651, 656-663 (1977); *Cobbledick* v. *United States*, 309 U.S. 323, 324-326 (1940).

The pretrial order at issue here "obviously is not final in the sense of terminating the criminal proceedings in the trial court." *United States* v. *MacDonald*, *supra*, 435 U.S. at 857. Nor does it fall within the "collateral order" doctrine established in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-547 (1949), for those extraordinary cases that warrant suspension of the rule against piecemeal review. Petitioner claims that a public trial will prejudice the conduct of his defense. It is clear, therefore, that the district court's order denying closure is

neither collateral to nor separable from the issues that will be presented at trial. Petitioner's claim may best be resolved after that trial has been completed. Petitioner will not forfeit his right to obtain appellate review by refusing to give testimony in a public trial. See *New Jersey* v. *Portash*, 440 U.S. 450 (1979). Moreover, he may present his defense in the more limited fashion suggested by the district court, or he may choose not to present the defense that he has contemplated. If he is convicted, he may raise his claim upon appeal, with the benefit of a complete record demonstrating the actual, rather than speculative, effects of the court's ruling. See *United States* v. *MacDonald, supra*, 435 U.S. at 858-861; see also *Gannett Co.* v. *DePasquale, supra*, 443 U.S. at 398 (Powell, J., concurring) ("[f]or it would be entirely impractical to require criminal proceedings to cease while appellate courts were afforded an opportunity to review a trial court's decision to close proceedings").

To the extent that special circumstances may exist in a particular case such that the denial of a closure motion may truly threaten irreparable injury not effectively reviewable on appeal from a final judgment, we agree with the dissenting judge in the court of appeals (Pet. App. 18-21) that mandamus would be more appropriate than an appeal under 28 U.S.C. 1291. Unlike the dissenter, however, we believe that the record in this case is barren with respect to proof of any such special circumstances.

In sum, we submit that the court of appeals erroneously assumed jurisdiction in this case. We do not believe that there is any need for this Court to review the jurisdictional issue in the present case, however, in light of the absence of any conflict among the circuits, the desirability of permitting further consideration and analysis of the jurisdictional issue by the courts of appeals (should that

issue continue to arise), and the correctness of the ruling denying petitioner's closure request.

2. On the merits, petitioner first contends (Pet. 8-10) that the court of appeals erred in declining to hold (Pet. App. 13-14) that the government must bear the burden of proving that closure is not required whenever a defendant has offered any evidence to show that his rights might be jeopardized by a public trial. The court of appeals properly recognized, in light of both the unbroken Anglo-American tradition of public trials and the sound principles supporting that tradition, that any party seeking to close a trial, even on constitutional grounds, is the one who must shoulder the burden of showing that no reasonable alternative short of closure will adequately protect his rights. See *Richmond Newspapers, Inc.* v. *Virginia, supra,* slip op. 23 (opinion of the Chief Justice); slip op. 3 (Stewart, J., concurring in judgment); *Gannett Co.* v. *DePasquale, supra,* 443 U.S. at 440-445 (Blackmun, J., concurring in part and dissenting in part). That burden was properly imposed upon petitioner and, as we discuss below, he failed to meet it.[1]

3. Petitioner further contends (Pet. 10-15) that the district court employed an overly restrictive standard in determining whether his motion should be granted. While petitioner now asserts that the district court's use of the "clear and convincing evidence" test did not adequately take into account his interest in obtaining a fair trial, the fact is that petitioner himself proposed that standard (Pet. App. 12; Appellant's Br. 6). Moreover, petitioner did not

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[1]Contrary to petitioner's suggestion, the government's burden of proving every essential element of the offense has no bearing on the issue of closure (Pet. App. 14). Because petitioner seeks to abridge the public's constitutional right to witness the conduct of a criminal trial, he must bear the burden of establishing that that abridgement is necessary.

challenge that standard in the court of appeals, and he should not now be heard to complain that it was inappropriate. *United States* v. *Lovasco,* 431 U.S. 783, 788-789 n.7 (1977).

Noting that petitioner had failed to demonstrate any prejudice resulting from the standard that he had proposed (Pet. App. 12-13), the court of appeals suggested (Pet. App. 10) that a more appropriate standard would have been that advanced by Mr. Justice Blackmun in *Gannett*. Mr. Justice Blackmun there suggested that a defendant would have to establish "a substantial probability" that a public trial would damage his right to a fair trial, that alternatives to closure would not protect that right, and that closure would be effective in preventing the alleged harm. *Gannett Co.* v. *DePasquale, supra,* 443 U.S. at 441-442. The court of appeals observed that the test employed by the district court, while similar to Mr. Justice Blackmun's, was somewhat stricter because it required "clear and convincing" evidence. The court of appeals concluded, however, that petitioner's proof was insufficient under either test (Pet. App. 12-13).

Moreover, the record supports both courts' findings that petitioner had failed to show any special circumstances to justify a closed trial. First, petitioner asserted that the possibility of physical harm would deter him from presenting evidence in his defense. He did not establish that that fear was reasonable, however, nor did he show that it would actually deter him from presenting his defense. Petitioner appeared to base his fear of certain individuals largely on allegations of their general reputations (Tr. 15, 21, 22, 51, 66). He offered no concrete evidence that his testimony was likely to result in any real danger to him or to his family. While he claimed that one individual had previously threatened him concerning another case, he admitted that he and his wife had

nevertheless testified against that person, without any resulting harm, only about a week after the threat (Tr. 47). Moreover, petitioner had previously stated his willingness to testify if necessary in other cases in which he was an informant (Tr. 51-52). He did not offer any evidence to support his contention that other cases had been dismissed because the government was concerned for his safety rather than to preserve his usefulness as an informant (Tr. 13-15). It was also shown that petitioner was generally known as a government informant in any event (Tr. 53, 72). Petitioner simply failed to show how an open trial would further compromise his safety or that of his family.

Furthermore, as the district court observed, petitioner offered no evidence that closure of his trial—in which a jury would determine his guilt or innocence—could effectively prevent the eventual disclosure of the information that he wished to present (Pet. App. 43). Finally, petitioner advanced no alternative short of complete closure of his entire trial, and he offered no reasons to show why other measures would not be effective.

On its own motion, the district court nevertheless considered whether any viable alternative existed. See *Richmond Newspapers, Inc.* v. *Virginia, supra,* slip op. 23; *Gannett Co.* v. *DePasquale, supra,* 443 U.S. at 441-442 (Blackmun, J.). The court suggested, for instance, that petitioner might present the substance of his evidence by means of a stipulation or court-approved summary, without the necessity of revealing the specific details that he alleged would endanger him (Pet. App. 43-44). In that manner, petitioner could adequately convey to the jury the type of past activity in which he claims he was still engaging at the time of the alleged offense.

The dissenting judge in the court of appeals agreed that closing the entire trial was unwarranted in this case, but

he believed that the district court should have ordered the closing of some portions of the trial (Pet. App. 21-36). Petitioner, however, never sought that relief. He never suggested how a partial closure could be structured or what specific portions of the trial would have to be closed. Morover, the district court properly found that petitioner had not shown that his safety or that of his family were in fact likely to be endangered by a public trial. Although partial closings of trials are not unprecedented (see, *e.g., United States ex rel. Lloyd* v. *Vincent,* 520 F. 2d 1272 (2d Cir.), cert. denied, 423 U.S. 937 (1975); *United States* v. *Bell,* 464 F. 2d 667 (2d Cir.), cert. denied, 409 U.S. 991 (1972); and cases cited at Pet. App. 33-34), an adequate factual justification must be established. *Richmond Newspapers, supra,* slip op. 23-24. On the record presented here, the district court did not abuse its discretion in finding that no such justification had been shown. In the circumstances of this case, petitioner simply failed—under any standard—to prove that a private trial was necessary for the presentation of his defense.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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